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In the Supreme Court of the United States

OCTOBER TERM, 1966.

UTICA MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

MERLE D. VINCENT, JR., REGIONAL DIRECTOR OF THE THIRD REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. _____

UTICA MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, and THE HONORABLE STEPHEN W. BRENNAN, SENIOR JUDGE OF SAID DISTRICT COURT,
Respondents.

MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS

Misc. No. _____

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June 12, 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No.

UTICA MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

MERLE D. VINCENT, JR., REGIONAL DIRECTOR OF THE THIRD REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Utica Mutual Insurance Company, a domestic mutual insurance corporation organized under the laws of the State of New York, prays that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Second Circuit on March 14, 1967, or in the alternative that this Court grant Petitioner's motion for leave to file a petition for a writ of mandamus to the United States District Court for the Northern District of New York, and to The Honorable Stephen W. Brennan, Senior Judge of said District Court (p. 1a, *infra*).

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Second Circuit is printed as Appendix A hereto and was not reported at the time of the printing of these petitions.

The Memorandum Decision and Order of the District Court appears in the Joint Appendix filed in the Circuit Court of Appeals (pp. 9-15) and in Appendix B hereto. It was not reported.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered March 14, 1967 (Record p. 50). Petitioner did not seek a rehearing in the court below. The jurisdiction of this Court to issue a writ of certiorari to the Court of Appeals is invoked under 28 U.S.C. Sec. 1254(1).

The jurisdiction of this Court to issue a writ of mandamus to the District Court is invoked under 28 U.S.C. Sec. 1651(a).

QUESTIONS PRESENTED.

1. Are the due process requirements of the Fifth Amendment to the Constitution violated by a statute which provides that an administrative tribunal deciding a case without having heard the witnesses is, in every case, prohibited from receiving any report, recommendation or the conclusions of the officer or employee who heard the witnesses, including a report, recommendation or conclusions as to credibility and demeanor of the witnesses and conflicts in the evidence?

2. If the answer to Question No. 1 is in the affirmative, are these constitutional requirements applicable to the hearings required in representation cases before the Na-

tional Labor Relations Board under Section 9(c)(1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 159(c)(1)?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The principal statute involved is 29 U.S.C. Sec. 159(c)(1), and in addition, with respect to Petitioner's motion for leave to file a petition for a writ of mandamus, 28 U.S.C. Sec. 2282, both of which statutes are set forth in Appendix C.[1] The constitutional provision involved is the Fifth Amendment to the Constitution and is also set forth in Appendix C.

STATEMENT OF THE CASE.

This action instituted in the District Court for the Northern District of New York challenges the constitutionality of a provision of Section 9(c)(1) of the National Labor Relations Act as amended (29 U.S.C. Sec. 159(c)(1)) relating to the conduct of representation hearings required to be held by the National Labor Relations Board for the purpose of determining the unit appropriate for purposes of collective bargaining. The section provides that upon the filing of a petition by a union seeking certification as the exclusive bargaining agent of a unit of employees of an employer, the Board, "if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

The section further provides that "Such hearing may be conducted by an officer or employee of the regional office, and *he shall not make any recommendations with respect thereto.*" (Italics supplied.) It is this italicized

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[1] 29 U.S.C. Secs. 159(a) and 159(b) are also set out in pertinent part in Appendix C for the convenience of the Court.

provision which the Petitioner contends is unconstitutional because it results in a denial of procedural due process to the Petitioner required by the Fifth Amendment to the Constitution. The provision prohibits, even in cases involving substantial issues of credibility and material conflicts in the evidence, which were assumed to be present in this case, the officer or employee who hears the evidence from making any recommendations to the deciding tribunal which has not heard the witnesses.

Petitioner's suit was filed after the Regional Director of the Third Region of the National Labor Relations Board served a notice of representation hearing as a result of a petition filed by the Communication Workers of America, AFL-CIO, seeking certification for a unit of Petitioner's employees at its main office in New Hartford, New York. The complaint sought a declaratory judgment of invalidity and also an injunction to restrain further proceedings in the Board case. With respect to the request for an injunction Petitioner also moved for the convocation of a 3-judge panel pursuant to 28 U.S.C., Sec. 2282.

The District Court denied Petitioner's motion for the convocation of a 3-judge court and dismissed the action. Petitioner thereafter appealed to the Court of Appeals of the Second Circuit. The decision of the District Court was affirmed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

I. The Court of Appeals in this Case Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

The constitutionality of the provision of the Act here challenged has not previously been passed upon by this Court, which in itself presents a federal question of substantial importance and one which should be decided by this Court.

In addition the two questions relating to the determination of the validity of the provision involve most important issues of federal law, namely: (a) the application, and the extent thereof, of the requirement of procedural due process and a fair hearing to administrative hearings; and (b) the specific application of the constitutional requirement of due process to representation hearings required by the National Labor Relations Act, as amended.

A. The Application of Procedural Due Process to Administrative Hearings.

There have been various cases which have considered and passed upon whether or not as a constitutional requisite a deciding administrative tribunal which did not in a particular case hear the evidence and observe the witnesses must obtain recommendations or conclusions of a hearing officer, at least as to issues of credibility and conflicts in testimony. The cases have not always been uniform in result.

In state court cases, although there are some which have held that a deciding tribunal need not hear the witnesses or receive a report, *Knapp* v. *State Industrial Commission,* 154 P.2d 964 (Okla., 1944), the more general rule appears to be as stated in *Crow* v. *Industrial Commission,* 140 P. 2d 321 (Utah, 1943, concurring opinion):

> "What is required to meet the demands of due process, that is of a full and fair hearing, is that he who observes the witnesses and listens to the evidence must transmit his observations or conclusions to those who are to decide." (p. 326)

See, also, *Radaca* v. *U. S. Smelting & Mining Co.,* 158 P. 2d 540 (Ariz. 1945); *Shawley* v. *Industrial Commission,* 114 N.W. 2d 872 (Wisc. 1962).

Federal courts of appeal have also reached conflicting results.[2] In *S. Buchsbaum & Co.* v. *FTC,* 153 F.2d 85 (C.A. 7, 1946), the Court held[3] that the failure of the Federal Trade Commission to order a trial *de novo* before a second examiner after the first examiner died during the hearing violated due process,[4] while in *NLRB* v. *Stocker Mfg. Co.,* 185 F.2d 451 (C.A. 3, 1950) the Court held that in a similar situation involving an NLRB examiner there

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[2] The conflicts between the courts of appeal as a separate reason for granting the writ of certiorari is discussed, *infra,* under point II.

[3] In what was described as an "able opinion" by *Wigmore, Evidence,* 3rd Ed., Sec. 946, 1946 Pocket Supp., Note 1 to p. 498.

[4] Cf. also *Smith* v. *Dental Products Co.,* 168 F.2d 516 (C.A. 7, 1948) and *Federal Deposit Insurance Corporation* v. *Siraco,* 174 F.2d 360 (C.A. 2, 1949).

was not a violation of due process.[5] The Court of Appeals in the instant case followed the decision in the *Stocker* case and made no reference to the *Buchsbaum* case.

This Court has not had before it and has not therefore decided whether or not the failure of a deciding tribunal to have a report, recommendation or the conclusions of a hearing officer in a particular case violated due process.[6] Although this Court granted certiorari in the *Buchsbaum* case, the appeal was dismissed upon waiver of error by the company.[7] And certainly this Court has not passed upon the principal issue involved here of the constitutional validity of a broad and absolute statutory proscription removing all discretion from the courts and the administrative agency as to the necessity or advisability of the deciding tribunal receiving recommendations or conclusions from the hearing officer.

Two cases, however, which are somewhat analogous are *Morgan* v. *U.S.*, which was before this Court on four

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[5] The *Stocker* case was criticized by Profesor Davis in his *Administrative Law Treatise*: "Perhaps the most important federal case of the 1950's which is out of line with the usual principle is *NLRB* v. *Stocker Manufacturing Co.* . . . the authority of which is weakened by the court's questionable assumption that the Examiner in the *Mackay* case made no report to the Board, and by the Court's failure in relying upon the *First Morgan* case to note that the Supreme Court said nothing about making findings without any knowledge of the demeanor of witnesses." Vol. 2, Section 11.18, pp. 115-116.

[6] In two cases involving National Labor Relations Board decisions, the Board decisions were affirmed although a report from the Trial Examiner had not been received by the Board in either case, but the constitutional question was not in issue. *NLRB* v. *Mackay*, 304 U.S. 333 (1938); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938).

[7] 328 U.S. 818 (1946).

occasions,[5] and *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404 (1962).

With respect to the *Morgan* cases, because of the several decisions and the generality of the language used, its holding may be regarded as somewhat ambiguous although it generally supports Petitioner's position.[6] In addition, the *Morgan* cases were decided at the very infancy of the administrative tribunal system and it seems now appropriate for this Court to state more definitive guidelines as to the requirements of due process with respect to these "multiplying agencies."

The *Walton* case is more closely analogous to the instant case. The Fifth Circuit Court of Appeals established in effect a *per se* rule as to the weight to be given to the testimony of employers in reinstatement cases before the Board, holding that unless an employer's testimony was impeached or contradicted in such cases, the testimony must be accepted as true. This Court struck down the rule because it disregarded the importance of the observation of the demeanor of witnesses by the one hearing the evidence.

A leading authority, Professor Davis, in his *Administrative Law Treatise* concluded that ". . . the emerging basic

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[5] 298 U.S. 468 (1936); 304 U.S. 1 (1938); 307 U.S. 183 (1939); and 313 U.S. 409 (1941).

[6] See, for example, "the one who decides must hear" in *Morgan* I at p. 481; ". . . these multiplying agencies . . . must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concept of fair play . . ." (Morgan II, p. 22); and the emphasis by the Court that the Secretary of Agriculture "dealt with the enormous record in a manner not unlike the practice of judges in similar situations and that he held various conferences with the Examiner who heard the evidence" (Morgan IV, p. 422).

principle to which most of the cases adhere is that one hearing or deciding officer may be substituted for another if but only if those who decide have opportunity to take into account the demeanor of witnesses in any case in which demeanor of witnesses may be a substantial factor." Vol. 2, Sec. 11.21, p. 129.

Since this Court has not specifically dealt with the subject of the constitutional necessity of a deciding tribunal receiving a report or recommendations from the hearing officer who heard and observed the witnesses, and particularly since the question here involves a broad statutory provision prohibiting the hearing officer from making any report to the deciding tribunal, the Court should pass upon this important federal question.

B. The Specific Application of the Constitutional Requirement of Due Process to Representation Hearings Required by the National Labor Relations Act, as Amended.

This case also involves a second issue of substantial importance which should be decided by this Court; namely, whether the representation hearing required by Section 9(c)(1) of the National Labor Relations Act, as amended, is subject to the constitutional protection of due process.

This issue also has not previously been passed upon by this Court. Like the question in Point A, decisions on related issues lead to conflicting conclusions in applying them to the present case. For example, *Inland Empire Council* v. *Millis,* 325 U.S. 697 (1945), has been cited as possible support for the proposition[10] that a representation hearing is not a "trial type hearing,"[11] because of

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[10] See opinion of Judge Friendly, p. A-7, Appendix A.

[11] Davis, *Administrative Law Treatise,* Vol. 1, Section 7.02, as to "trial type hearings."

comments such as the proceeding is "not technical" and is "essentially informal, not adversary."[12] Yet the Court in that case emphasized in its opinion that the purpose of the hearing was to provide "interested parties full and adequate opportunity to present their objections before the Board" (p. 708) and that due process required at some point in the proceeding "the requisite hearing [be] held before the final order becomes effective" (p. 710).

Although there can be no question but that an employer has a right "to be heard" with respect to the determination of the bargaining unit,[13] the representation hearing is in fact the *only point* at which a resolution of credibility issues and conflicts in testimony can be made by the one hearing and observing the witnesses. At every hearing thereafter, including before a trial examiner in a refusal to bargain case, only the written transcript is considered as to the bargaining unit determination.[14]

If, therefore, due process does require, at least in cases involving resolutions of issues of credibility, a report of the hearing officer, the only hearing at which such resolutions can be made is the representation hearing provided by Section 9(c)(1)—and by the terms of the statute challenged the hearing officer is expressly prohibited from making any recommendations.[15]

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[12] However, cf. *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), in which the Court in referring to the case of *Leedom* v. *Kyne*, 358 U.S. 184 (1958) described the proceeding as "a purely domestic *adversary* situation." (p. 480) (Italics supplied.)

[13] *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

[14] 28 U.S.C. 159(d), Section 9(d) of the Act; *NLRB* v. *Poinsett Lumber & Mfg. Co.*, 221 F.2d 121 (C.A. 4, 1955).

[15] The importance of this hearing is emphasized by the fact that a decision as to the appropriate bargaining unit "if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

In a later step in the representation proceeding—*i.e.*, determining the eligibility of specific employees to vote with respect to challenged ballots—the courts have uniformly insisted that due process is applicable to such determinations. *NLRB* v. *Capital Bakeries, Inc.*, 351 F.2d 45, 51 (C.A. 3, 1965); *NLRB* v. *Joclin Mfg. Co.*, 314 F.2d 627 (C.A. 2, 1963). Indeed the Board's Regulations specifically recognize that "a report resolving questions of credibility" may be required in such cases.[16] Obviously, the question of whether *individual* employees come within a bargaining unit in an election is of far less importance than the initial determination of the scope of the *entire* bargaining unit.

This Court not having passed upon the application and extent of the requirements of due process in the representation hearing, it is submitted that this important federal question should also now be decided by this Court.

A subsidiary issue presented involves whether or not the constitutional issue can be initiated by a court proceeding during the representation hearing, as opposed to the Petitioner being compelled to go through the review procedure required by Sections 10(e) or (f) of the Act (29 U.S.C., Sec. 160(e) and (f)). The Petitioner however is not seeking a "review" of a decision in a representation proceeding. Rather, it is challenging the validity of the procedure of the Board, similar to the challenge to the Board's authority in *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

It would seem clear that if a hearing is being conducted in violation of the constitutional requirements of due process, a party to the hearing need not wait for some alternative time to raise the question and such action is not therefore premature. *Boire* v. *Miami Herald Publish-*

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[16] Rules and Regulations of the Board, Series 8, as amended, Sections 102.69(d) and (e).

ing Co., 343 F.2d 17 (C.A. 5, 1965), cert. den. 382 U.S. 824.

II. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals.

The Court of Appeals in its opinion stated the principal question in this case to be whether the due process clause of the Fifth Amendment requires "that when there are issues of credibility, as was assumed to be true here, no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to credibility by another who has . . .[17] (Appendix A, p. A-4). The Court answered this question in the negative stating that a report by the hearing officer was not a "constitutional imperative."

A contrary result was reached by the Court of Appeals of the Seventh Circuit in *S. Buchsbaum & Co.* v. *FTC*, 153 F.2d 85 (1946)[18] which held that the failure to have a trial *de novo* after the death of a trial examiner constituted a violation of due process since the second examiner did not hear all the witnesses.[19] This case was disregarded by the Court of Appeals in the instant case and instead it relied upon *NLRB* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (C.A. 3, 1950) holding that with respect to a National Labor Relations Board proceeding there was no

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[17] This is in fact a too narrow statement of the issue involved. The issue here is the validity of a statute prohibiting such a report in *every case*, not only whether in this particular case a report of the hearing officer was a constitutional necessity.

[18] Cert. granted but error waived 328 U.S. 818 (1946).

[19] See also *Smith* v. *Dental Products Co.*, 168 F.2d 516 (C.A. 7, 1948) (Master in an action for accounting died after hearing the evidence and district judge then decided case); *Federal Deposit Insurance Corporation* v. *Siraco*, 174 F.2d 360 (C.A. 2, 1949) (Judge who heard witnesses died and second judge rendered judgment). Both cases were reversed.

constitutional violation in a second trial examiner continuing with a case after the death of the first.[20]

The instant case and the *Stocker* case are squarely in conflict with the *Buchsbaum* case and this conflict should be resolved by this Court.

CONCLUSION.

This case not only presents the question of the constitutional validity of a provision of a major federal act, but also affords the Court an opportunity to resolve important questions with respect to the application of due process requirements to the administrative process and specifically to representation hearings pursuant to the National Labor Relations Act. Because these questions need to be, and may now be, resolved, Petitioner submits the writ of certiorari should issue.

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[20] Criticized in *Gamble-Skogmo, Inc.* v. *FTC*, 211 F.2d 106 (C.A. 8, 1954) holding replacement of trial examiner violated Administrative Procedure Act, and by Davis, *Administrative Law Treatise*, Vol. 2, Sec. 11.18, p. 115. See footnote 5, p. 7, *supra*.